

# FORENSIC URINE Drug Testing

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## Disabilities Act to Affect Drug Testing

By David G. Evans

**T**he implementation of the Americans With Disabilities Act of 1990 (ADA) has raised a number of questions about how the act will affect employment drug testing.

The questions include: How can employers avoid discrimination against employees who may have protected disabilities under the act? Can employers ask for medication lists to be submitted when testing specimens? Such lists may reveal that an employee is taking a medication for a condition that is a protected disability. How will the use of a medical review officer affect this process? Does the use of an MRO constitute a medical inquiry, which is limited under the ADA? Can employers conduct tests for drugs other than illegal drugs? When can drug tests take place?

Although authorities still differ on how the ADA is to be implemented, and case law has yet to have an impact, some general guidelines have emerged.

### Discrimination prohibitions

Before discussing these guidelines, it will be helpful to provide some background on the ADA and how it affects substance abuse in general.

The ADA prohibits discrimination based on physical and mental disabilities in private sector employment as well as by state and local government.

Employers with 25 or more employees were covered on July 26, 1992; on July 26, 1994, employers with 15 to 25 employees will be covered by the act. The act also applies to discrimination in the provision of public services by state governments, local governments, and private entities.

Employers are prohibited from discriminating against an employee or potential employee in the processes of hiring or firing, compensation, advancement, training or other terms, conditions, and privi-

leges of employment.

An employer is prohibited from inquiring into an applicant's disabilities, although the employer may inquire into the applicant's ability to perform job-related functions.

Employers are required under the ADA to provide reasonable accommodation to individuals with disabilities who can perform the essential functions of the job unless the accommodation would constitute undue hardship on the employer. If an applicant with a disability meets the prerequisites, the employer must then consider whether the applicant can perform the essential job functions with or without reasonable accommodation.

The ADA was created to encourage employers to focus on an individual's abilities, rather than his or her disabilities.

### Drug-testing specifics

Specific provisions of the ADA deal with substance abuse and drug testing.

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## PASSIVE INTOXICATION

Passive inhalation of crack smoke can lead to intoxication, the case study shows on page 4.

The *Forensic Urine Drug Testing Education/Newsletter* is an educational service of the FUDT program. The FUDT program, cosponsored by the American Association for Clinical Chemistry and the College of American Pathologists, includes three components: FUDT accreditation, the FUDT proficiency testing survey, and this newsletter. The accreditation program is the responsibility of the CAP. The surveys are sponsored jointly by AACC and CAP. The newsletter is published by the AACC.

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## Disabilities Act

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Under the ADA the term "individual with a disability" does not include someone who presently engages in the illegal use of drugs, but its protections do extend to recovered drug addicts who are no longer engaging in the illegal use of drugs and who have demonstrated successful rehabilitation or participation in a drug rehabilitation program. Thus an employer is not required by the ADA to accommodate employees or job applicants who are currently using illegal drugs even if they are addicts. An employee currently using illegal drugs is not protected by the ADA and therefore the employer may discharge the employee regardless of work performance or may retain the employee and hold the employee to the same employment standards as other employees.

Alcoholism is a protected disability under the ADA. An alcoholic is protected even if the alcoholic is currently using alcohol unless the use interferes with job performance. Employers may hold alcoholics to the same employment and performance standards as other employees even for unsatisfactory performance that is related to their alcoholism.

The ADA permits employers to prohibit the illegal use of drugs and the use of alcohol in the workplace, to prohibit employees from working under the influence of alcohol or illegal drugs, and to require them to behave in accordance with the Drug-Free Workplace Act of 1988, which bans drug use in the workplaces of companies that have federal contracts in excess of \$25,000.

The ADA, and its predecessor the federal Rehabilitation Act, permit employers to conduct drug tests to determine if employees and applicants are currently using illegal drugs. Employers can test for illegal drugs without having to show business necessity or that the test is job-related.

### Medical exams limited

**The ADA specifically prohibits employers from administering medical examinations before an offer of employment has been made to an applicant. *Testing for illegal drugs, however, is not considered a medical examination under the act.*** As a result, employers may require job applicants to submit to drug testing before they make a conditional offer of employment.

The pre-job offer drug test an employer uses must be designed, however, to detect only illegal drugs, and an applicant who tests positive may challenge the test on the grounds that the result was caused by medication taken lawfully.

Even though tests for illegal drugs are not medical tests or examinations and can be conducted during any phase of employment, under the ADA the evaluation of positive test results can raise discrimination issues because it may constitute a medical inquiry.

If an employer uses an MRO, a physician knowledgeable in substance abuse and drug testing, or any other agent or employee of the employer to evaluate positive results, the evaluation may be considered a medical examination inquiry.

The ADA permits or prohibits medical examinations depending on the phase of employment. In the pre-job offer stage, an employer, or any agent of an employer such as a laboratory or MRO, cannot make medical inquiries.

In a situation where a conditional job offer has been made, an employer or an employer's agent, such as an MRO, can ask any medical question or conduct a medical examination as long as all applicants are treated the same.

Once a person is employed, the employer can only ask medical questions or conduct medical examinations if they are job-related and consistent with business necessity.

Standard drug-testing procedures used to have an employee list any medications being taken prior to conducting the test. These procedures allowed the test giver to eliminate positive results due to lawful medications. Under the ADA, asking about medications is a medical inquiry and as such employers would violate the ADA if they followed these procedures in the pre-offer stage. Therefore, employers are advised to conduct drug testing at the post-offer stage when they can ask medical questions.

Employers wishing to conduct pre-offer drug testing run some risk of violating the ADA prohibition on medical inquiries. To lessen these risks, employers seeking to conduct pre-offer testing should not ask any medical questions prior to the test. Only if the test is positive should the employer seek an explanation.

In the pre-offer situation the employer or agent of the employer can ask for an explanation of a positive test or ask if the person was using drugs lawfully. If the company does not use an MRO, the applicant can be told about the result by the laboratory or company medical or personnel department (if the company uses on-site testing) and be asked for an explanation. If the applicant reveals protected information, such as use of a prescription drug, the test result will be reported to the employer as negative and the information on the prescription drug cannot be used by the employer for a discriminatory purpose and is pro-

tected by the confidentiality provisions of the ADA.

Under the ADA, alcohol testing is considered a medical examination and thus must adhere to the ADA rules on medical tests. The ADA does not preempt federal Department of Transportation alcohol testing procedures that are in direct conflict with ADA provisions.

### **Proof of drug use**

A positive drug test for illegal drugs should only be regarded as proof of [the current use of illegal drugs. Proof of current use of illegal drugs permits the employer to not hire an applicant or to fire or discipline an employee.

Some individuals who tested positive for drugs have claimed that the drug test "diagnosed" them as drug abusers and thereby entitled them to protection as disabled persons. The courts have reviewed numerous such claims and determined that drug tests detect current illegal drug use which is not a disability.

If a drug test detects an over-the-counter or lawfully prescribed medication, the information is confidential under the ADA. Any information regarding the medical condition or history of any employee or applicant obtained from a drug test except information regarding the illegal use of drugs, is subject to the requirements of the nondiscrimination and confidentiality requirements of the ADA. Such information must not be used for any discriminatory purpose inconsistent with the ADA. The information cannot be used to screen out persons with disabilities unless the objection is job-related and consistent with business necessity and performance of the job functions cannot be reasonably accommodated.

### **Record-keeping**

Information regarding the medical condition or history of an applicant obtained by drug or alcohol testing must be collected and maintained on separate forms and in separate medical files from other applicant information and must be treated as a confidential medical record. However, supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations. First aid and safety personnel may be informed, when appropriate, if the disability requires emergency treatment. Government officials may be informed while investigating compliance with the ADA. Information may also be released for insurance and workers compensation purposes under certain circumstances.

In establishing a drug-testing program, an employer must have tight confidentiality and report-

ing procedures. All information, interviews, reports, statements, memoranda, and test results, written or otherwise, received by the employer or a laboratory through a drug-testing program should be considered confidential communications.

Federally mandated drug-testing programs must protect the confidentiality of drug-test results. A good example of this protection is found in the federal Department of Transportation regulations on drug testing. For example, prior to the results going to the employer, they must be reviewed by an MRO. The MRO can release drug-test results to the employer only after they have been confirmed positive and only after the MRO has discussed the results with the employee or has made a good faith effort to do so. The results are otherwise strictly confidential. As for other medical information the MRO gathers on employees, the MRO may disclose such information to the employer, a DOT agency or other federal safety agency, or a physician responsible for determining the medical qualification of the employee, without violating the ADA, under a DOT regulation only if the regulation requires such disclosure.

Before obtaining medical information from the employee as part of the verification process, the MRO must inform the employee that information may be disclosed [to third parties as provided in the regulations and the identity of any parties to whom information may be disclosed.

### **Contracts with laboratories**

Employer contracts with laboratories and MROs should require that they maintain employee test records in confidence, as required in DOT agency regulations. The contracts must provide that the laboratory may only disclose information related to a positive drug test of an individual to the individual, the employer, or the decision-maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual and arising from a certified positive drug test.

There are also federal regulations that govern the confidentiality of the records of alcohol and drug abuse patients in alcoholism and drug treatment programs that are federally funded and/or have an Internal Revenue Service nonprofit tax-exempt status. This includes most treatment programs used by employers to treat substance abusing employees. The regulations are strict and generally permit release of information only with patient consent, a special court order, or in a medical emergency. However, laboratories can agree to become a "qualified service organization," which permits them to analyze and report on speci-

**mens** providing they protect the confidentiality of patient information.

In addition to confidentiality of medical records, many states have laws that apply to laboratory records and to drug testing. These laws may provide confidentiality protection and some specify how records should be kept. An employer or laboratory, in conjunction with legal counsel, should examine federal and state statutes, case law, and regulations to determine current law dealing with confidentiality of medical and laboratory records and drug-test results.

An employer should obtain a consent form to release information from the individual to be tested. A proper consent form should protect the employer from any liability for releasing drug-test results in accordance with the consent form. However, in the case of a positive test where the result is due to a lawfully used medication, this information may be protected under the ADA and therefore should not be released to the employer unless permitted by the ADA.

The ADA does not prohibit companies subject to the federal Department of Transportation or other federal drug testing requirements from testing employees in safety sensitive positions for the illegal use of drugs and removing those who test positive.

### summary

In light of the above, some guidelines can be stated regarding drug testing and the ADA. With pre-employment testing, some authorities have advised that the safest course is that testing should only take place after a conditional offer of employment. In such cases, the employer can ask for a medications list prior to conducting drug testing. If the test is positive but is determined to be the result of legal drug use, then the employer cannot use the information about the legal drug use unless there is a reason that is job related and consistent with business necessity. The employer has already made the decision to hire contingent on no illegal drug use.

If the test is performed before the conditional offer of employment, then some authorities argue that there should be no request for information on medications until there is a positive result since such a request is clearly a medical inquiry. If the result is positive, then the applicant can be asked to provide an explanation. If the explanation is sufficient, i.e., the positive was from a legal medication, then the test should be reported as a negative and no information about a medication or a disability should be used.

Another course of action if there is a positive result for illegal drugs in the pre-job offer stage is to

make no inquiry as to a possible explanation and refuse to hire the person. This way no information regarding a disability is obtained; however, until the law is further defined, this may put the employer at some risk because the employer rejected an applicant thought to be an illegal drug user when the applicant may be taking a drug for lawful purposes due to a disability, such as opiates for pain control.

In the case of an employee, if there is a positive result the employee can be fired or disciplined based on illegal drug use. An MRO can be used to determine if legal use of medications caused the positive test. Any legal use must not be used in employment decisions and must be kept confidential.

The law regarding the ADA will continue to evolve. Drug testing is allowed under the ADA and will continue to aid employers in ensuring the productivity of the American workforce. ■

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## Focus on Washington

### HCFA REITERATES CLIA '88 EXEMPTION FOR DRUG-TESTING LABORATORIES

The Health Care Financing Administration reaffirmed the exemption of workplace drug-testing laboratories from CLIA '88 regulations in a letter to AACC president Lemuel Bowie. Bowie had requested clarification of the agency's policy on this issue.

The letter from Barbara Galal, director of HCFA's health standards and quality bureau, said: "CLIA regulations do not apply to testing conducted for forensic purposes and, until further notice, workplace drug testing for employment purposes, including components or functions of any employer entity that performs substance abuse testing for any purpose other than as part of a treatment program. The CLIA rules do not apply to testing that results in disciplinary, administrative or legal action, if the test is positive, or to testing for the presence or absence of substances of